

8-19-93

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A basic issue pertinent to the three contested motions is whether Confidential Business Information (CBI) submitted to the Environmental Protection Agency (EPA) by Nalco Chemical Company (Nalco) regarding the chemical identified on the EPA Trade Name Index as Nalco 5RD656 and CBI submitted to EPA by Lubrizol Corporation (Lubrizol) regarding the chemical identified on the EPA Trade Name Index as Lubrizol 8202, should be released to the

Respondent subject to the terms of a proposed protective order that was submitted with the Respondent's motion seeking limited disclosure of the aforementioned CBI relating to both chemicals. With regard to both NALCO 5RD656 and Lubrizol 8202, Respondent seeks all information in EPA's CBI files including, but not limited to, Forms A and C and any inventory correction correspondence. The Respondent's request for the release of this CBI information is specifically conditioned upon the data being used for the limited purposes of this proceeding and subject to the proposed protective order. The CBI is being sought by the Respondent pursuant to the statutory authority in Section 14(a)(4) of the Toxic Substance Control Act (TSCA), 15 U.S.C. §2613(a)(4), which provides that CBI may be disclosed when relevant in proceedings under TSCA, except that such disclosure shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding.

In opposing release of the CBI regarding the two above identified chemicals, Complainant correctly points out that, under Section 2.306(i)(4) of the EPA Regulations governing TSCA CBI, 40 CFR §2.306(i)(4), release of CBI may be made only after the owners of the chemicals involved (in this case Nalco and Lubrizol) are given notice and opportunity for comment, and only if the Presiding Judge finds: 1) that the ability of the party requesting release to participate effectively in the proceeding will be significantly impaired unless the information is disclosed; and 2) that any harm to an affected business that will

result from the disclosure is likely to be outweighed by the benefit to the proceeding and the public interest that will result from the disclosure. As Complainant persuasively asserts, disclosure of such information according to the EPA Regulation cited above requires a balancing test, in addition to notice to the owners of the CBI involved, with an opportunity for them to comment prior to release of the CBI.

Accordingly, this order is being served on Nalco and Lubrizol, who are hereby given notice of the potential release of the CBI relating to the chemicals Nalco 5RD656 and Lubrizol 8202.¹ Those two corporations are given until September 20, 1993, to provide comments with regard to this potential release and are specifically requested to set forth any real or potential harm that might affect their business from release of this CBI. The comments from these companies should also contain any legal arguments relating to the potential release of the CBI involved, including the sufficiency of the proposed protective order and any changes that the parties might suggest in the protective order, if it is considered to be inadequate by Nalco and/or Lubrizol.

Moreover, since the contested motions identified above involve issues that could well be dispositive of the liability

¹ In addition to this Order, Nalco and Lubrizol are also being furnished with copies of the Respondent's motion seeking disclosure of the CBI, which includes the proposed protective order, and with Respondent's reply to Complainant's opposition to the motion. Complainant had previously served Nalco and Lubrizol with its pleadings relating to the motion to disclose the CBI.

aspects of this proceeding and since the motion relating to ex parte consideration of the CBI raises certain unique procedural issues, oral argument regarding the motions would be helpful. Therefore, a prehearing conference for the purpose of having oral argument on the three contested motions is hereby scheduled for 10:00 a.m. on Wednesday October 6, 1993, at the Environmental Protection Agency, 401 M Street SW, Room 2126M, Washington, DC.

The Headquarters Hearing Clerk is requested to provide the services of a court reporter for the oral argument on these motions.

SO ORDERED.



Daniel M. Head
Administrative Law Judge

Dated: August 19, 1993
Washington, DC

IN THE MATTER OF BAKER PERFORMANCE, formerly CHEMLINK PETROLEUM,
INC., Respondent
Docket No. TSCA-91-H-08

CERTIFICATE OF SERVICE

I certify that the foregoing Order Setting Oral Argument and Giving Notice of Potential Release of Confidential Business Information, dated August 19, 1993, was sent in the following manner to the addressees listed below:

Original to:

Bessie Hammiel
Headquarters Hearing Clerk
(A-110)
U.S. Environmental Protection
Agency
401 M Street, SW, Room 3708
Washington, DC 20460

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U.S. Environmental Protection
Agency

Dated: August 19, 1993
Washington, D.C.